The Court of Appeal for Bermuda

CRIMINAL APPEAL No 14 of 2014

Between:

DARRONTE DILL

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Mr. Marc Daniels, Charter Chambers Bermuda, for the Appellant
Mr. Rory Field and Ms. Karen King, Department of Public Prosecutions, for the Respondent

Date of Hearing: **16 March 2015**

Date of Judgment: **20 March 2015**

JUDGMENT

PRESIDENT

1. This appellant appeals long out of time against his sentence for the brutal murder of two elderly men. He was sentenced to life imprisonment on each count with a direction that he is not eligible for release on licence until he has served at least 20 years.

2. The late appeal comes about in this way. On 8 October 2013 the Privy Council handed down a decision in the case of *Selassie v The Queen* and *Pearman v The Queen* [2013] UK PC 29. That decision concerns the true construction of Section

286A(2) and the proviso to section 288(1) of the Criminal Code Act 1907. Those sections provided for the period to be served before eligibility for release on licence (parole) in the case of life sentences for murder and premediated murder, the relevant period being 15 years in the case of the former and 25 years in the case of the latter.

3. The Privy Council held that the sections specified maximum periods and that the periods in the sections were fixed periods unalterable by a Court. The periods specified by the Court were accordingly reduced in the case of *Selassie* from 28 years to 25 and in the case of *Pearman* from 21 years to 15.

4. Section 70Q of the Code, effective from 29 October 2001, makes provision for eligibility for parole for persons under 18 convicted of murder. The period is 7 years in the case of murder and 10 years in the case of premeditated murder. The section provides:

> "Notwithstanding sections 286A and 288 of this Act, where an offender who was under the age of 18 years at the time of the commission of the offence is convicted of premeditated murder or murder and is sentenced to imprisonment for life, the offender shall not be eligible for release on licence until he has served –
>
> > (a) 10 years, in the case of a person convicted of premeditated murder who was 16 or 17 years of age at the time of the commission of the offence; and
> > (b) 7 years, in the case of a person convicted of murder who was 16 or 17 years of age at the time of the commission of the offence."

Subsection (a) has since been repealed as the offence of premeditated murder has been subsumed into the offence of murder.

5. The appellant was three days short of his 18th birthday when he committed the murders and therefore falls within section 70Q(b). Mr. Daniels, for the appellant, submits that the wording of section 70Q makes the case indistinguishable from

Selassie and Pearman, albeit covering 16 and 17 year olds rather than adults and that accordingly 7 years is a fixed period unalterable by the Court and accordingly the Chief Justice was wrong to fix the period at 20 years. The Director of Public Prosecutions accepts this submission but with the caveat that since the appellant was convicted of two murders the period of 7 years for each should be aggregated to a total of 14 years.

Facts

6. The appellant was convicted of the brutal murder of two elderly homeless men. They were attacked at night while sleeping and stabbed multiple times and one of them, Mr Brangman, was also beaten, probably with a rock, and ultimately set on fire. Whilst the pathologist's report showed that he was dead when the appellant set him a light the reality is he had no way of knowing that for sure. The other, Mr, Gilbert, was stabbed thirteen times. The evidence was that he jumped into the water to escape the attack and subsequently expired.

7. The appellant's confessions suggest that he carried out these killings gratuitously to see what it felt like to kill someone. Although he initially made a full and frank confession, he later repudiated it and accordingly was given no credit for it. The judge said he showed no remorse or indeed any real appreciation of the horror of what he had done. He said there was no real mitigation. There was nothing to explain or justify his behaviour. He said, in passing sentence, that he took into account the difficulties of the appellant's family life and upbringing and also his age and that he was few days short of his 18th birthday at the time of the offences, but that, on the other hand, he had already acquired a serious criminal record and was subject to a suspended sentence of three (3) years imprisonment for carrying a bladed weapon at the time of the offences.

8. The Social Inquiry Report shows that he presented a real risk of re-offending and a high risk of violent behaviour. The judge described the aggravating features of the case. The main ones being that there were two victims, that the appellant used extreme violence, that he persisted with the attacks without mercy or

remorse and that there was an element of premeditation in that he had gone out looking for someone to kill. He acknowledged, however, that the appellant was not charged with premeditated murder.

9. The Chief Justice understandably thought that section 70Q provided a minimum period of 7 years having taken the same view in *Selassie and Pearman* before it was appealed to higher courts. He said that in England the starting point would be 12 years, he took a 7 year period for each victim, added 6 years for other aggravating features and arrived twenty 20 years saying it would have been considerably longer but for the appellant's age.

10. The problem with the Chief Justice's approach is that the Privy Council subsequently held that the tariff periods in the legislature are fixed periods and not subject to adjustment by the court.

11. The provisions relied upon by the Privy Council in *Selassie and Pearman* namely section 286A(2) and the proviso to section 288(1) have been repealed by Parliament and replaced with section 288(1A) so that from 19 September 2014 the Court has had a discretion in determining the period to be served before an application for parole can be entertained. Section 70Q(b) of the Code, however, remains unaltered. So Parliament chose not to alter the provision in relation to 16 and 17 year olds. It can therefore be inferred that it was Parliament's intention to retain the mandatory provision and exclude the Court's discretion in respect of 16 and 17 year olds. We understand that for those under 16. Parliament has made no provision as to the period to be served before eligibility for parole. See for example *R v Codrington* a decision of Hellman J on the 5 September 2013.

12. Mr. Field, the Director of Public Prosecutions, argues that the Court is entitled to fix tariff periods in respect of each offence, albeit limited in each case to 7 years as provided by section 70Q(b). Accordingly the total tariff period he submits should be 7 + 7 = 14 years.

13. He also sought to argue that despite the decision in *Selassie and Pearman* it was still open to the Court to pass a lower tariff period than 7 years and that this overcame the proportionality argument that a tariff of 14 years might be considered disproportionately high for an offender under 18 years. In our view the passage of Lord Wilson's judgment at paragraph 15 makes this point unarguable.

14. In our judgment, the starting point is to look at the warrant of commitment. The appellant was sentenced to life imprisonment on each count. The warrant requires the Commissioner of Corrections to keep him in prison for the term of life. The sentences were concurrent. Indeed, as Mr Field conceded, there is no such thing as a consecutive life sentence. The life sentence is a singular term. Furthermore, it is well established that a life sentence lasts for the whole of a defendant's life notwithstanding that at some point he is released on parole.

15. The tariff period is an integral part of a life sentence, but it is a single tariff regardless of whether there are concurrent life or determinate sentences. Our attention has not been drawn to any case in which more than one tariff was included on a single sentencing occasion.

16. One of the difficulties with the contention that each of the offences should carry a 7 year tariff is the arbitrary nature of the second tariff. As the tariff, as described by Lord Wilson, is neither a maximum nor a minimum the second tariff brings the figure up to 14 years; there can be no intermediate point. Furthermore, the fact that there are two murders is the only aggravating feature of the offences that can be taken into account to bring the tariff above 7 years.

17. We were referred to a number of authorities. In *R v Noble* [2003] 1 Cr App R(S) 65 it was held wrong in principle to impose consecutive sentences to exceed the maximum penalty for one offence when several deaths were caused by the same piece of dangerous driving. In *Anderson v R* [2014] Bda LR 31, this Court reviewed a number of earlier authorities and held that the trial judge was entitled

to impose a sentence of 7 years imprisonment consecutive to a tariff period of 15 years, imposed 3½ years earlier on a life sentence for murder. The 7 year sentence was for seriously assaulting another prison inmate. In *R v Jumah and ors* [2010] EWCA Crim 2900 Lord Judge C.J. made an order for detention for public protection with a minimum period assessed at 6 years to run consecutively to a mandatory life sentence for murder with a minimum term of 14 years. The second homicide offence was committed whilst the defendant was on bail for the first. Although he was still young, it was held to be inappropriate for the punitive element of the second sentence imposed for manslaughter to be entirely subsumed in the sentence imposed on him for the earlier murder. In our judgment none of the authorities entitle the Court to impose consecutive tariffs for two murders resulting in concurrent life sentences imposed on the same occasion.

18. It is understandable that the legislature should impose a lower tariff for young offenders than that for adults, although we think it is unfortunate that the court has been given no discretion as to the length of the tariff so as to be able to tailor the length to the particular facts of the case. Furthermore, the legislative intention to retain the mandatory 7 year tariff for a 16 or 17 year old can be implied from the fact that Parliament gave back discretion to the Court in the case of adults whilst leaving the position unchanged for 16 and 17 year olds, notwithstanding the decision in *Selassie and Pearman*.

19. We should also emphasise that eligibility for consideration for parole is a far cry from the grant of parole. The Parole Board will no doubt, when considering parole, give careful thought not only to the fact that the appellant was convicted of two murders but also the other aggravating features of the terrible offences as described in the Chief Justice's sentencing remarks. We note that in the Parole Board Act 2001 section 7 entitles the Minister responsible for Prisons to give directions to the Board with regard *inter alia* to the need to protect the public from serious harm or danger from offenders.

20. Although not in his original submissions, the DPP took an additional point that the appellant at the time of the commission of these murders was 4 months into a suspended sentence of 3 years imprisonment. He submitted that it was open to the judge, and therefore open to this Court, to implement that sentence and impose the life sentence to run consecutively and thus extend the 7 year period the appellant would have to serve before eligibility for parole. This was, however, very much of an afterthought and would not have been, even if technically permissible, appropriate in our judgment on the facts of this case.

21. In these circumstances this appeal against sentence is allowed to the extent that the period the appellant has to serve before he can be considered for parole is reduced from 20 years to 7 years. This is not a conclusion we have reached with any enthusiasm but in our view it reflects the current state of the law.

Signed

Baker, P

Signed

Kay, JA

Signed

Bell, JA